People ex rel John A. Swanson v. *James J. Kelly, Judge*, 352 Ill. 567.

We submit that the Appellate Court of Illinois by its judgment acted capriciously and arbitrarily and in flagrant defiance of the recent teachings of this Court. A search of the authorities discloses no case where there has been so gross and so brazen a miscarriage of justice in defiance of the controlling decisions of this Court.

There is a general principle in every enlightened jurisdiction that for every wrong there must be a remedy. It is embodied in the Constitution of Illinois in Article II, Par. 19, which provides:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obligated to purchase it, completely and without denial, promptly, and without delay."

Recognizing that the machinery for appeal in the State of Illinois to the Supreme Court of that state is elusive and subject to technicalities, your petitioner properly resorted to every means of review provided by the laws and rules of Illinois to obtain a review of the questions of his federally created rights which in the first instance were violated by the decision of the Illinois Appellate Court including an application to file a petition for writ of mandamus to require that court to expunge its judgment forever depriving petitioner of his rights under the Federal Boiler Inspection Act and depriving him of his unquestionable right to the benefits of the Federal Safety Appliance Act.

No cause in the history of English jurisprudence can be found where such a writ was more warranted and justified than in the case at bar. Historically under the English common law writs of mandamus or prohibition were resorted to in order to prevent a miscarriage of justice where the ordinary processes of court procedure and review were inadequate or ineffective in preventing such miscarriage.

No court, state or federal, has any right or authority to disregard the federally created rights of which petitioner has been deprived in the exercise of judicial discretion. On the contrary, the Supreme Court of every state, including Illinois, must zealously safeguard such federal rights at all times. Only in such a way can uniformity and unanimity be attained by all. All railroad employees, passenger and highway travelers* will be endangered as long as the decision of the Illinois Appellate Court in this cause remains unexpunged and unreversed. The power of the Supreme Court of Illinois to remedy the situation by mandamus cannot be abrogated if that is the only means open to it.

Therefore, in fairness and in justice to all carrier employees and the public, the writ prayed for should be allowed by the Court. Only in that way will the majesty and uniformity of the federal laws be firmly upheld and justice to all assured.

II.

This Court has Jurisdiction to Review the Judgment of the Appellate Court of Illinois and the Orders of the Supreme Court of Illinois Dismissing Petitioner's Writ of Error and His Petition for Leave to Appeal Which Are Final Judgments and Decrees Within the Purview of Title 28, United States Code, Sec. 1257 (3). In Any Event They are Subject to Review Under the Provisions of Title 28, United States Code, Sec. 1651 (a).

1.

The judgment of the Illinois Appellate Court is a final judgment (A) under the Federal Law and (B) under the Illinois Law.

A. Federal Law.

In the most recent decision of this Court on the question of finality of a judgment in *Dickinson* v. *Petroleum Conver-*

* Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589.

sion Corporation, 70 S. Ct. 322, decided January 16, 1950, Mr. Justice Jackson in the prevailing opinion stated:

> "The only issue presented by this case turns on the finality of a judgment for purposes of appeal, a subject on which the volume of judicial writing already is formidable. * * *
>
> "Half a century ago this Court lamented, 'Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. * * * The cases, it must be conceded, are not altogether harmonious.' * * * This lamentation is equally fitting to describe the intervening struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand, and the danger of denying justice by delay on the other."

Respondent's primary contention in No. 43 is that the Appellate Court did not render a final judgment or decree within the meaning of Title 28 U. S. C. § 1257 (3) contending that because the action was remanded to the Superior Court for a new trial it is not final, citing many ancient repudiated decisions of this court reported in Howard, Wallace and Wheaton Reports and in the early volumes up to 183 United States Reports. Among these early cases especially relied upon by the respondent is *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130, in which it was held that this Court is precluded by the face of the judgment and the respondent quotes the judgment of the Appellate Court in this case. We submit that "the old 'face of the judgment' rule" has been abrogated by this Court in its more recent decisions on this now settled question. We call attention to

the fact that the remand for a new trial was not a general remand for the retrial of all the issues, but was only a remand for further proceedings "in conformity with the opinion of this Court this day filed herein". Under that opinion petitioner is precluded from any right to relief for the violation by the respondent railroad company of the provisions of the Boiler Inspection Act.

In *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, this Court immediatey following the respondent's quotation from that case (Resp. Brief in No. 43 pp. 10-11) went on to say:

> "Increasingly this court has become less formal in the matter of final judgment. It is no longer the rule that the face of the judgment is determinative of whether it is final. (Referring in footnote 4 specifically to *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130). Today the 'test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court * * *'."

Why did the respondent omit the crux of the foregoing paragraph in the case of *Gospel* v. *City of Los Angeles*, supra? Certainly the reason is obvious for the decision here clearly and manifestly affirms the petitioner's contention that in the case at bar your petitioner's rights under the Federal Boiler Inspection Act have been forever barred and wrongfully denuded from his complaint.

By the same token respondent's reliance upon *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99 is unavailing. That decision proceeded upon the now discarded theory that the face of the state court judgment controls the question of finality with respect to the jurisdiction of this Court to review it. The face of the judgment is now as dead as the dodo bird. By this metamorphasis this Court

has mandatorily advised all state supreme and inferior courts of the nation that they will not be permitted to hide behind the shredded skirt of the heretofore existing face of the judgment rule now repudiated wherever litigants have been deprived of their life, liberty and property guaranteed to them by the Constitution and decisional laws of this Court.

The test of finality is therefore not limited to the face of the judgment but extends to the opinion and to other pertinent factors within and without the record. *Department of Banking* v. *Pink*, 317 U. S. 264, 268; *Richfield Oil Corporation* v. *State Board*, 329 U. S. 69, 72. The facts in these cases clearly indicate and respondents do not dispute that the opinion and order of the Appellate Court is final on any new trial under the Appellate Court's opinion with respect to his right to recover under the Federal Boiler Inspection Act. Petitioner in his complaint alleged three distinct or different causes of action or claims for relief.

1. Violation of the Federal Employers' Liability Act.
2. Violation of the Federal Boiler Inspection Act.
3. Violation of the Safety Appliance Act.

Illinois practice permits a plaintiff "to unite in one count various causes of action growing out of the same circumstances and to eliminate the necessity of separate counts as to separate causes of action formerly required under the common law of Illinois." *Sperry* v. *Wabash R. Co.*, (D. C. E. D. Ill. 1943) 52 F. Supp. 337, 338; *Mitchell* v. *Geister*, 337 Ill. App. 390, 86 N. E. 2d 293 (1949).

The Illinois Appellate Court ruled as a matter of law that, although there was an issue of fact as to the defective condition of the rear headlight, there could be no recovery under the Federal Boiler Inspection Act because under its interpretation of that Act and Rules 129 and 131 of the Interstate Commerce Commission no rear headlight was required in view of the unalterable facts that the locomotive at

the time of the accident was being used in road service and was backing in a terminal movement to couple on to its train.

The significance of the court's ruling is that petitioner on remand of this case is precluded from obtaining recovery or relief under the cause of action or claim for relief based on the Boiler Inspection Act. The opinion of the Appellate Court is the law of the case binding on the trial court. *Schneiderman* v. *Interstate Transit Lines, Inc.*, 401 Ill. 172; *The Town of Kaneville* v. *Meredith*, 361 Ill. 556. It is apparent in view of the basis upon which the Illinois court rests its decision that no new, different or additional evidence can be introduced which would permit petitioner to recover under the Boiler Inspection Act. Under these circumstances the cause of action or claim for relief founded on the Federal Boiler Inspection Act has been deleted from the complaint and finally adjudicated.

The more realistic, just and enlightened view which this Court in its recent decisions has taken with respect to the question of finality of judgments and orders for purposes of review as opposed to the now abandoned old "face of the judgment rule" upon which respondents rely, is evidenced by the adoption by this Court of Rule 54-B of the Federal Rules of Civil Procedure and its decision under that rule in *Reeves* v. *Beardall*, 316 U. S. 283, where it was said:

> "Such a separate judgment will frequently be a final judgment and appealable though no disposition has been made of the other claims of the action. Bowes v. Commercial Casualty Ins. Co., 4th Cir. 107 F. (2) 169, 170. That result promotes the policy of the rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of' though the trial court has not finished with the rest of the litigation."

We have, therefore, proven that the United States Supreme Court has jurisdiction to review the case at bar, and

reinstate the rights of your petitioner to the protection of both the Boiler Inspection Act and the Safety Appliance Act by reversing the erroneous decisions of the Illinois Appellate Court. In doing so, the Supreme Court of the United States will direct the Illinois Appellate Court to a more proper and fitting understanding of the Federal rights herein involved; and will remove the blinking incredulous assumption that a bad back-up headlight permanently affixed to an engine used in the night season is better than no light at all, thereby protecting human life as was intended when Congress adopted the Federal Boiler Inspection Act.

B. Illinois Law.

Under the law, practice and decisions of the State of Illinois, the judgment of the Illinois Appellate Court is a final judgment in view of the refusal by the Supreme Court of Illinois to grant leave to appeal from it and the dismissal by that court of petitioner's writ of error.

There can be no doubt whatever that the Appellate Court's opinion forecloses any recovery under the Federal Boiler Inspection Act. Under Illinois law where one cause of action or claim for relief has been finally adjudicated and one or more other claims for the same relief remain pending, the adjudication of one of the claims is final and appealable.

Roddy v. *Armitage Hamlin Corporation,* 401 Ill. 605 (1949) is conclusive on this proposition. In that case plaintiff brought an action to have a lease declared null and void. The claim for cancellation was based upon (1) violation of Section 72 of the Business Corporation Act, and (2) for fraud. The claim for cancellation upon the ground of violation of the Business Corporation Act was dismissed and while the action was still pending with respect to the claim for cancellation on the ground of fraud, plaintiff prosecuted an appeal from the order dismissing the claim for cancellation because of alleged violation of the Business Corporation Act and the question was presented as to whether that

order was final and appealable under Section 77 of the Illinois Practice Act. The Supreme Court of Illinois held that the order was final and appealable.*

As before pointed out, practice in Illinois permits the plaintiff to unite in one count any number of causes of action growing out of the same circumstances and the form of the complaint does not affect the right to appeal if, in fact, a separate claim or cause of action can be construed to have been finally adjudicated. *Sperry* v. *Wabash R. Co., supra; Mitchell* v. *Geister, supra.*

In this case your petitioner applied to the Appellate Court for leave to appeal to the Illinois Supreme Court and after denial of that application applied to the Supreme Court for leave to appeal which was likewise denied. He also sued out a writ of error which the Supreme Court had constitutional authority to entertain under Article VI Par. 11 of the Constitution of that State. Such jurisdiction is not affected by any statutory restriction limiting jurisdiction of that court with respect to the finality of the judgment to be reviewed.

**Roddy* v. *Armitage Hamlin Corporation, supra:* "A final order has been variously defined. In general, to be final and appealable, an order or decree must terminate the litigation between the parties on the merits of the cause, so that, if affirmed on review, the trial court has only to proceed with the execution of the order or decree. (Rogers v. Barton, 375 Ill. 611; Free v. The Successful Merchant, 542 Ill. 27) While this definition is well established and ordinarily applicable, other less restrictive expressions have frequently been expounded. For example, we have recently held that a final judgment is one finally disposing of the rights of the parties on the merits of the general controversy, or it may be a judgment on the merits of only one definite and separate branch of the general controversy, if the effect of the decision is the final disposition of the litigation. (Moffat Coal Co. v. Industrial Com. 397 Ill. 196; Brauer Machine and Supply Co. v. Parkhill Truck Co. 383 Ill. 569). Furthermore, it is settled that even the final determination of a collateral matter distinct from the general subject of litigation and settling the particular issue as between the parties is a final and appealable order. (Wyman v. Hageman, 318 Ill. 64; Sebree v. Sebree, 293 Ill. 226). Approaching the problem from another viewpoint, a decree retaining jurisdiction for future determination of matters of substantial controversy between the parties is not final (Rettig v. Zander, 364 Ill. 112; People ex rel Nelson v. Stony Island State Savings Bank, 355 Ill. 401) but an order is final for purposes of review where only incidental matters are reserved for future consideration (Groves v. Farmers State Bank, 368 Ill. 35; Eich v. Czervonko, 330 Ill. 455), and, *lastly, an order may be a final and appealable determination even though matters of substantial controversy remain to be disposed of in the trial court.* Newberry Library v. Board of Education, 387 Ill. 85; Hoier v. Kaplan, 313 Ill. 448." (Italics ours)

Therefore the decision of the Supreme Court of Illinois denying the petitioner's writ of error is a final judgment under the Illinois law.

It is the settled law of Illinois that where a constitutional question arises for the first time in the Appellate Court, the Supreme Court has jurisdiction to review the judgment of the Appellate Court by writ of error and on such writ to review all questions presented in the record. *Dinofria* v. *Brotherhood of Teamsters,* 399 Ill. 304, pp. 306-7, cert. denied, 335 U. S. 815; *Cuneo* v. *City of Chicago,* 272 Ill. 473, and the other authorities cited on page 30 of petition in No. 125.

The basic philosophy of the "final judgment rule" is to "avoid the evils of a piecemeal review." *Republic Natural Gas Co.* v. *State of Oklahoma,* 334 U. S. 62, 67.

Would the review in this case by the Supreme Court result in a "piecemeal review" or to rephrase the question, would review at this stage of the proceeding fully adjudicate the rights of the petitioner and of the respondent railroad company?

It is submitted that if this court reviewed the case on the merits, its adjudication would not be subject to further review by a state court. *Department of Banking* v. *Pink,* 317 U. S. 264, 268.

As previously stated, this case consists of three causes of action or claims for relief. Respondent admits liability under the Federal Employers' Liability Act.

It is patent that the Illinois Appellate Court erred as a matter of law in holding that the respondent railroad company did not violate the Federal Boiler Inspection Act. Similarly, the court usurped the functions of the jury when it held there was insufficient evidence to sustain a violation of the Federal Safety Appliance Act, and this in the face of the fact that that issue was conceded and was not contested. *Tiller* v. *Atlantic Coast Line R. R. Co.,* 323 U. S. 574; *Wilkerson* v. *McCarthy,* 336 U. S. 53; *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350; *Brady* v. *Southern Ry. Co.,* 320 U. S. 476; *Hill* v. *Atlantic Coast Line R. R. Co.,* 336 U. S. 911.

If these adjudications are reversed, then all that remains is the ministerial function of the state court in reinstating the judgment for petitioner which was entered on the jury's verdict after a fair trial and under proper instructions.

The causes of action founded upon the Federal Boiler Inspection Act and Safety Appliance Act are both legally and factually proper remedies to which your petitioner is entitled. The facts, argument and brief submitted overwhelmingly substantiates your petitioner's rights to be afforded the protection under these acts.

Since there can be no legal defense of contributory negligence as we have shown in this brief, the sum awarded by the jury and judgment entered by the trial court is modest indeed. This litigation should be brought at an end, and your petitioner should be freed from any further embroilment of retrials and reappeals.

In fairness and with due regard to justice, the petitioner's writ for certiorari as prayed for should be allowed, the judgment of the Appellate Court of Illinois for the First District should be reversed, and the judgment awarded by the Superior Court of Cook County, Illinois, in favor of petitioner and against the respondent railroad company for the sum of $40,000.00 and costs should be affirmed.

Respectfully submitted,

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Petitioner

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 43

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,
Petitioner,

vs.

JOHN M. TUOHY, PRESIDING JUSTICE, GROVER C. NIEMEYER AND MICHAEL FEINBERG, JUSTICES, CONSTITUTING THE FIRST DIVISION OF THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT,
Respondents.

MOTION TO STRIKE REPLY BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

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Respondents.

MOTION TO STRIKE REPLY BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

Now come John M. Tuohy, Presiding Justice, Grover C. Niemeyer and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents, by their counsel, and move the Court to strike the Reply Brief filed by the Petitioner in support of his Petition for Writ of Certiorari, and in support of said motion tender unto the Court the attached suggestions.

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
EDWARD J. WENDROW,
Counsel for Respondents.

SUGGESTIONS IN SUPPORT OF MOTION TO STRIKE REPLY BRIEF.

In availing themselves of the privilege of a reply brief, counsel have so far exceeded propriety in heaping inaccurate abuse and invective upon the Appellate and Supreme Courts of Illinois, the judicial system of Illinois, and counsel for respondents that it is almost impossible to separate wheat from chaff, hyperbole from fact.

The reply brief has apparently been filed on the theory that if a sufficient torrent of abuse is directed at the Illinois Courts, petitioner can overcome his jurisdictional obstacles in securing review by this Honorable Court. This method of advocacy should neither be tolerated nor encouraged.

Inexperienced advocates sometimes may be carried away by avidity but in a case handled by seasoned counsel our highest court should not be compelled to find each point allegedly involved obscured by unhelpful calumny. We refer to such unjustifiable outbursts as (italics ours):

> "* * * *inquitous disregard* by the [Illinois courts] of petitioner's statutory and constitutional rights" (p. 2).
>
> "* * * rights * * * *despoiled and destroyed* by the Illinois courts" (p. 2).
>
> "What chance would this Petitioner have on a second or third appeal to the Supreme Court of Illinois in view of *its conduct in refusing to correct the gross injustice* which the Appellate Court has inflicted upon the Petitioner" (p. 2).
>
> "* * * the *brazen, flaunting disregard by the Appellate and Supreme Courts of Illinois,* of the laws of the Congress and the Constitution of the United States, the laws and Constitution of the State of Illi-

nois, and the clear emphatic decisions of this Court'' (p. 6).

''[Counsel for Respondent's] *subterfuge* is as illusory as it is *insincere*'' (p. 7).

''* * * There was no contest and it was in effect admitted at the trial that the brake on the coal car was inefficient'' (p. 7. See also pp. 8, 9, 10)—in the face of the fact that the issue *was* contested and plaintiff's counsel themselves tendered instructions treating it as contested and permitting the jury to find either way on it (R. 251, 255).

The truncated quotation (pp. 9-10) from one of our briefs in the Appellate Court of Illinois with respect to the slope of the track when counsel well know that the first 12 pages of that Brief were a vigorous argument by us that counsel's assertions on appeal that the incline of the siding was toward the main line were a ''perversion of the record''; that the witnesses testified, and were understood as so testifying, even by petitioner's counsel himself, that the slope was downward and away from the main line.

''* * * testimony can be likened unto *potter's clay in the hands of respondent's counsel*'' (p. 10).

''The Illinois Courts *flagrantly* and erroneously violated both the Constitution and the Laws of the United States by their *refusal to conform* to the federal decisional law * * * and by their *arbitrary denial* of Petitioner's indisputable rights'' (p. 11).

''* * *false* and baseless claim'' (p. 12).

''* * *flagrant*, erroneous violation by the Illinois Courts of both the Constitution and the Laws of the United States and by their *refusal* to conform to the federal decisional law * * *'' (p. 13).

''* * * respondent in the face of this *admitted testimony of entrapment* seeks a brass ring on his legalistic carousel, [*sic*]'' (p. 12).

''* * *illegal usurpation* of substantive rights and an *unwarranted refusal to abide* by the rule of essential uniformity * * *'' (p. 16).

''Because of the *mongrel decisions and denial of appellate relief in Illinois*, as is apparent to this Court

in *Marino* v. *Ragen*, *supra*, and other decisions by the Illinois Supreme Court, the several different procedures of appeal were instituted by your Petitioner. By profound study and legalist analysis, the Supreme Court of Illinois has in a sense pronounced that if a litigant chose one method and not one of the other methods, the litigant erred in selecting the wrong procedure" (p. 16).

"If, as respondents contend, the judgment of the Appellate Court is not subject to review and correction by the Supreme Court of Illinois under *the archaic appellate practice in that state* * * *" (p. 16).

"* * * so gross and so *brazen a miscarriage* of justice in *defiance* of the controlling decisions of this Court" (p. 18).

The foregoing inaccurate and intemperate quotations are a sample of the material with which the Reply is studded. We will not dignify them by listing them all or answering them *seriatim*. However, respect for this Court, the Courts of Illinois and for ourselves does not permit them to go unchallenged. Each and all of those extravagant assertions are wrong in fact and wrong in law. We believe we are entitled to say:

1. The Illinois Bench is competent and conscientious. It had before it a simple case in which error under its interpretation of the "decisional law" of this Court was committed in the trial court. In addition, the damages awarded, we contend, were tenfold excessive regardless of contributory negligence. The case has been sent back for a new trial. We submit that the Illinois Appellate Court did not err in its interpretation, but, if it did err, this furnishes no justification for the contemptuous reply brief filed by petitioner's counsel.

2. Whatever may have been the merits of former Illinois criminal post conviction procedure (now changed by a Post-Conviction act, validity upheld in *People* v. *Dale*,

92 N. E. 2d 761), Illinois civil appellate procedure is neither "archaic", "technical" nor "elusive." In 1933, Illinois, under the guidance of Professor Sunderland, adopted an excellent Civil Practice Act. Professor Sunderland would scarcely have been chosen to assist in formulation of the federal rules if he had devised a system for Illinois one-half so fearsome as counsel endeavor to paint our simplified appellate procedure. Counsel's real complaint is that the Illinois Supreme Court lacks jurisdiction under the Civil Practice Act to review interlocutory Appellate Court judgments.

3. Whatever may be the merits or demerits of Illinois civil appellate procedure, Petitioner, an Indiana resident, voluntarily chose it over Indiana procedure. He did not sue defendant at Fort Wayne, Indiana, where the accident occurred. By the 15th day after the accident (Nov. 29, 1946, R. 109), he had come to Chicago, engaged counsel and was in the hands of a Chicago "expert" witness. The choice of Cook County, Illinois, as a forum obviously was not uninfluenced by the size of the verdict he hoped to obtain. Having voluntarily selected Illinois as the forum, Petitioner has little standing to complain of the procedure of the state he elected to go into.

4. The rash and unwarranted statements which tincture the Reply throughout are scandalous and impertinent.

Respectfully submitted,

HAROLD A. SMITH,
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EDWARD J. WENDROW,
Counsel for Respondents.

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PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO STRIKE HIS REPLY BRIEF.

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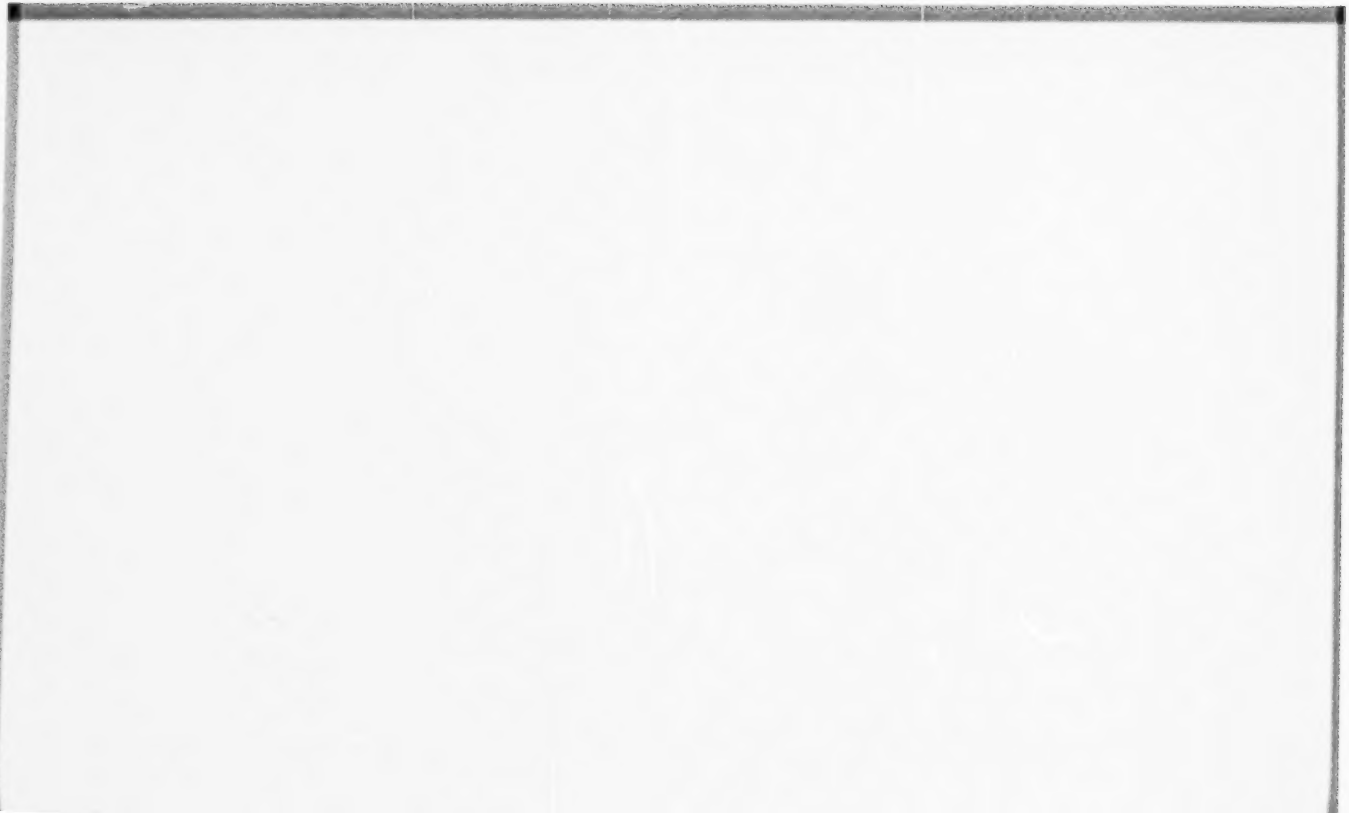

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The object of respondents' identical motions to strike petitioner's identical reply briefs in Causes No. 43 and No. 125 is not to uphold the majesty of the law, the dignity of the Illinois Courts, the adequacy of Illinois appellate procedure, or the merits of the indefensible and undefended decisions of the Illinois Courts in this cause. It is the last desperate effort of the respondent railroad company to retain, and to prevent this Court from reviewing, the grossly unfair and unlawful advantage which those decisions have wrongfully bestowed upon it in destroying petitioner's federally created right to full redress for the serious injuries which were inflicted upon him by the admitted negligence of the railroad company just before midnight on November 14, 1946.

The railroad company attorneys, who appear as counsel for the Presiding Justice and the Associate Justices constituting the First Division of the Appellate Court of Illinois for the First District in Cause No. 43, have the temerity to say in the name of those Judges and of that Court, as they do in Cause No. 125, in the name of their real client, the railroad company (p. 4):

> "In addition, the damages awarded, we contend, were tenfold excessive regardless of contributory negligence."

In other words, arrogantly expropriating to themselves the function of the jury, these attorneys assess at not more than $4,000.00 two fractures of petitioner's pelvis, fracture of his left ankle joint, dislocation of his right shoulder resulting in permanent loss of 25% to 50% of the use of the right arm, and the other painful injuries, sustained when he was crushed and rolled for a distance of five to ten feet or more in the 6 to 10 inch space between the side of the tender and the side of the fouling coal car, all resulting in total disability from performing the only kind of work he has ever done to support himself and his family since leaving the Orphanage, and a loss of earnings to date of about $14,000.00.

It is small wonder that attorneys so biased, partisan, prejudiced, and callous, should take umbrage at petitioner's justified criticism of the unjustifiable decisions of the Illinois Appellate and Supreme Courts in this cause, which forever deprive him of the benefit of the provisions of the Federal Boiler Inspection Act on any new trial under the Appellate Court's decision, and also of the benefit of the provisions of the Federal Safety Appliance Act, although liability thereunder was admitted, proven and not contested at the trial, and which relegate him to years of litigation with a litigous railroad company which, unlike

petitioner, is financially well able to engage in litigation indefinitely. Neither this motion nor respondents' briefs in this Court challenge these basic propositions.

The Illinois Civil Practice Act was a notable effort, on the part of Professor Sunderland and his eminent and forward-looking associates, to eliminate archaic practice and procedure in Illinois, and to enable the Illinois Courts to dispense "justice freely, * * * completely and without denial, promptly, and without delay" as provided in the ancient and not-too-well drawn Constitution of Illinois of 1870, but adherence to old concepts and impediments of that inadequate Constitution have resulted in procedural problems, which still remain to be ironed out, and some of which this Court recently has had occasion to criticize in *Marino* v. *Ragen,* 332 U. S. 561, and in other cases.

We think this Court can take notice of the strong current movement in Illinois for the adoption of the so-called Gateway Amendment, concerning which the President of the Illinois State Bar Association, under date of September 10, 1950, circularized the members of that Association in part as follows:

"September 10, 1950

To Members of the Illinois State Bar Association:

The Illinois State Bar Association has long urged, and is presently supporting, the adoption of the Gateway Amendment which is designed to liberalize the procedure for amending the Illinois Constitution of 1870.

We have joined the Chicago Bar Association and forty other organizations to form the Illinois Committee for Constitutional Revision, which is carrying on a state-wide campaign for adoption of the 1950 Gateway Amendment at the general election in November.

At the February, 1949, meeting of our Board of Governors, the Association created its Committee for Constitutional Revision to actively engage in furthering this important work. • • •

If you can assist in this work, please notify Mr. Sears, at the above address, so that he can add your name to the Speakers Bureau list.

Sincerely yours,
A. L. Yantes
President."

It is shocking to find counsel for the respondents seeking to bolster their motion to strike petitioner's reply brief, because petitioner is a resident of Indiana and "has little standing to complain of" "Illinois civil appellate procedure (p. 5)." Petitioner, at the time he was injured, was admittedly employed in interstate commerce by the respondent railroad company, an interstate common carrier by railroad, one of whose principal termini is in the City of Chicago, Illinois. The Federal Employers' Liability Act (28 U. S. C. Sec. 56) confers upon interstate railroad common carrier employees the unqualified right to bring an action in any state court of competent jurisdiction in any district in which the defendant does business. No litigant asserting federally created rights should be denied their enforcement by any State Court or by deficiencies in state court procedure, and certainly no litigant asserting rights of any character should be penalized for failing to foresee the indefensibly erroneous, unfair and unjust decisions which have been rendered by the Illinois Appellate and Supreme Court in this cause.

Vituperous epithets and vicious innuendoes deliberately designed to arouse prejudice against petitioner, and to prevent a fair, calm judicial decision in this cause, which abounded in the briefs and arguments of the respondent railroad company in the state courts, reappear mildly in

paragraph 3, p. 5 of respondent's "Suggestions" but will not, we are confident, influence this Court's decision in favor of this motion or against petitioner's application for certiorari and the restoration of the modest judgment he properly obtained in the Superior Court of Cook County, Illinois.

Far from being scandalous or impertinent, we respectfully submit that petitioner's criticism of the decisions of the Appellate and Supreme Courts of Illinois are sound, amply justified and wholly within the bounds of proper decorum.

We respectfully submit that respondent's motion to strike petitioner's reply brief should be denied.

Respectfully submitted,

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MAY 18 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1949

No. ~~738~~ 43

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,
Petitioner

v.

JOHN M. TUOHY, PRESIDING JUSTICE, GROVER C. NIEMEYER AND MICHAEL FEINBERG, JUSTICES, CONSTITUTING THE FIRST DIVISION OF THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT,
Respondents.

MOTION TO POSTPONE CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI UNTIL PETITIONS FOR WRIT OF CERTIORARI IN TWO OTHER PROCEEDINGS ARE FILED AND FOR CONCURRENT CONSIDERATION THEREOF.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1949

No. 738

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,
Petitioner

v.

JOHN M. TUOHY, PRESIDING JUSTICE, GROVER C. NIEMEYER AND MICHAEL FEINBERG, JUSTICES, CONSTITUTING THE FIRST DIVISION OF THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT,
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MOTION TO POSTPONE CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI UNTIL PETITIONS FOR WRIT OF CERTIORARI IN TWO OTHER PROCEEDINGS ARE FILED AND FOR CONCURRENT CONSIDERATION THEREOF.

Petitioner by his attorneys respectfully petitions this Court to withhold consideration and decision of the petition for writ of certiorari in the above-entitled cause, No. 738, until petitioner has had an opportunity to file in this Court petitions for writs of certiorari and briefs in support thereof in two companion proceedings in the same action hereinafter described. The certified records in both companion proceedings have been lodged with the Clerk of this Court and the printing of the transcripts of record in both proceedings has been completed under the direction of the Clerk of this Court within the past few days. The petitions for writs of certiorari and briefs in support thereof are in preparation and will be filed in

this Court as soon as they can be completed and printed, and in any event, prior to June 14, 1950.

In support of this motion, petitioner alleges:

1. Petitioner brought an action to recover damages for personal injuries, sustained November 14, 1946, against The New York, Chicago and St. Louis Railroad Company under the Federal Employers' Liability Act (45 U.S.C. §51 et seq.) and caused by its admitted negligence and its claimed violation of the Boiler Inspection Act (45 U.S.C. §23) and of the Federal Safety Appliance Act (45 U.S.C. §11) in the Superior Court of Cook County, Illinois. The jury rendered a verdict in favor of petitioner in the sum of $40,000 and judgment thereon was duly entered in said Court on May 7, 1948.

2. Defendant appealed to the Appellate Court of Illinois for the First District, which on November 21, 1949 reversed the judgment of the Superior Court with an opinion under which petitioner has finally been denied his statutory and constitutional rights under the Federal Boiler and Inspection Act and the Federal Safety Appliance Act.

3. Petitioner filed a petition for rehearing in the Appellate Court which in substance alleged that he had been denied his constitutional rights to a trial by jury and to equal protection of the law and his statutory rights under the provisions of the Federal

Employers' Liability Act, the Federal Boiler Inspection Act and the Federal Safety Appliance Act. This was denied on December 2, 1949.

4. Thereupon petitioner filed in the Appellate Court a petition for leave to appeal to the Supreme Court of Illinois and for a Certificate of Importance. This was denied on December 23, 1949.

5. Because of the pitfalls, short-comings and technicalities in the appellate procedure in Illinois and in order to protect his constitutional and statutory rights conferred by the Federal Employers' Liability Act, Federal Boiler Inspection Act and the Federal Safety Appliance Act, petitioner filed three separate proceedings with the Supreme Court of Illinois:

a) Petition for leave to file a Writ of Mandamus, presented to the Supreme Court of Illinois on December 31, 1949 and denied on January 10, 1950. Petitioner's petition for reconsideration of the order denying the motion for leave to file an original petition for writ of mandamus was denied on January 18, 1950. On April 7, 1950 petitioner filed in this Court in the above-entitled cause his petition for writ of certiorari and brief in support thereof to review the orders of the Supreme Court of Illinois in the mandamus proceeding. Respondents have filed their brief in opposition to the petition for writ of certiorari.

b) Writ of Error, sued out on December 31, 1949 and denominated as William Edward Woods, Plaintiff-in-Error v. The New York, Chicago and St. Louis Railroad Company, Defendant-in-Error, No. 31428.

On March 14, 1950, the Supreme Court of Illinois dismissed the writ of error. The plaintiff-in-error, petitioner herein, has lodged a certified copy of the record in said proceeding in this Court and will file as soon as possible a petition for writ of certiorari, directed to the Supreme Court of Illinois to review its order dismissing the writ of error.

c) Petition for Leave to Appeal filed December 31, 1949 and denominated as William Edward Woods, Petitioner v. The New York Chicago and St. Louis Railroad Company, a corporation, Respondent No. 31429. On March 16, 1950, the Supreme Court of Illinois dismissed the petition for leave to appeal. Petitioner has lodged a certified copy of the record in said proceeding in this Court and will file as soon as possible a petition for writ of certiorari directed to the Supreme Court of Illinois to review its order dismissing the petition for leave to appeal, or to the Appellate Court of Illinois for the First District to review its judgment reversing the judgment of the Superior Court of Cook County, as may be appropriate.

6. Petitioner has exhausted every proper remedy open to him in the state courts of Illinois in seeking vindication and enforcement of his federally created rights which have been finally and irrevocably violated by said courts, unless this Court intervenes and corrects the errors into which they have fallen.

7. Since the foregoing petitions for writs of certiorari are directed to the same action and tender similar issues of law, the interests of justice and expediency suggest that they be considered concurrently.

8. The action of this Court in postponing consideration of this proceeding until this Court has before it, and can act upon the petitions for writs of certiorari and briefs in support thereof in the other two proceedings above described, will not impose any hardship on respondents or defendant in subject action.

9. This motion is not filed for the purposes of delay.

Wherefore the premises considered, petitioner respectfully prays this Court to withhold consideration of the case at bar until the petitions for writ of certiorari and briefs in support thereof in the companion proceedings are filed herein and that the Court consider and pass upon all three proceedings concurrently.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I mailed copies of the foregoing motion this 18th day of May 1950 to:

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